Asia Control Systems Impac (M) Sdn Bhd v PNE PCB Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–1990 OF 2009 AND W-02–1982 OF 2009
LOW HOP BING, MOHD HISHAMUDIN AND AZHAR MA'AH JJCA
7 JUNE 2010

Arbitration — Arbitration clause — Construction of — Arbitration clause referring claims and disputes to arbitration under KLRCA Rules — Whether Arbitration Act 1952 provisions applicable — Whether such clause evinced parties intention to exclude claims and disputes from High Court's jurisdiction — Arbitration Act 1952 s 34

Arbitration — Award — Enforcement — Enforcement of award made under UNCITRAL Rules and KLRCA Rules — Whether High Court competent to effect enforcement of such award — Arbitration Act 1952 ss 27 & 34

Arbitration — Procedure — Rules and regulations — Arbitration under UNCITRAL Rules and KLRCA Rules — Whether provisions of Arbitration Act 1952 and any other written applicable — Arbitration Act 1952 s 34

Contract — Terms — Implied terms — Types of — Tests for

The appellant attempted to set aside an arbitration award made pursuant to the UNCITRAL Arbitration and KLRCA Rules. The appellant's application was dismissed by the High Court. The High Court instead allowed the respondent's application for leave to enforce the award. The appellant appealed against both decisions.

Held, dismissing the appeals with costs:

(1) The Court of Appeal was unable to find any express term in the parties' contract that provided for recourse to the High Court. The court was also unable to imply any term into the parties' contract capable of being construed as giving rise to any recourse to the High Court (see paras 10 & 13); *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 (FC) distinguished.

(2) The parties had freely and voluntarily entered into the contract. The court is not at liberty and will not rewrite the contract for parties who have expressly and carefully chosen to exclude court intervention. In the instant case, the parties had elected to abide by the UNCITRAL Arbitration Rules and KLRCA Rules and their election had to be viewed in the light of consequences flowing from s 34(1) of the Arbitration Act 1952 ('the Act'). Except for the enforcement of an arbitration award with leave of the High Court, s 34 of the Act excluded the application of the Act or other written law to any arbitration held under the UNCITRAL arbitration and KLRCA Rules (see paras 15–16).

(3) Apart from the 'the emergency situation' or a state of urgency as in T*hye Hin Enterprises Sdn Bhd v Daimlerchrysler Malaysia Sdn Bhd* [2005] 1 MLJ 293 (CA), the preponderance of authorities reveal that under s 34(1) of the Act, the provisions of the Act or other written law will not apply to any arbitration held — as in the instant case — under the UNCITRAL Arbitration Rules and the Rules of the KLRCA. In the instant case the parties had clearly, unambiguously and expressly excluded the dispute from the jurisdiction of the High Court (see para 36).

(4) Section 27 of the Act expressly provides for the discretion of the High Court to grant leave for the enforcement generally of an arbitral award handed down under the Act, and not under the UNCITRAL Arbitration Rules and the Rules of the KLRCA (see para 42).

(5) The enforcement of an arbitral award made pursuant to the UNCITRAL Arbitration Rules and the Rules of the KLRCA — as in the instant case — is specifically governed by s 34(1), (2) and (3) of the Act. The enforcement of such an award is an exception to the general exclusionary principle which dispenses with the application of the provisions of the Act or other written law to an arbitration under the UNCITRAL Arbitration Rules and the Rules of the KLRCA. Section 34(1) read with s 34(2) of the Act permits the enforcement under s 34(2) in Malaysia of an arbitral award made under s 34(1). Pursuant to s 34(3), the court of competent jurisdiction to effect the enforcement is the High Court (see para 43).

[Bahasa Malaysia summary

Perayu telah membuat percubaan untuk mengetepikan satu award timbang tara menurut Kaedah-Kaedah Timbang Tara UNCITRAL dan KLRCA. Permohonan perayu telah ditolak oleh Mahkamah Tinggi. Mahkamah Tinggi sebaliknya membenarkan permohonan responden untuk kebenaran menguatkuasakan award tersebut. Perayu telah merayu terhadap kedua-dua keputusan tersebut.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Mahkamah Rayuan tidak menemui apa-apa terma nyata di dalam

kontrak pihak-pihak tersebut yang memberi bantuan kepada Mahkamah Tinggi. Mahkamah juga tidak dapat membaca sebagai tersirat terma di dalam kontrak pihak-pihak tersebut yang berupaya untuk ditafsir sebagai boleh memberikan bantuan kepada Mahkamah Tinggi (lihat perenggan 10 & 13); *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 (MP) dibeza.

(2) Pihak-pihak tersebut secara bebas dan sukarela memasuki kontrak tersebut. Mahkamah tidak mempunyai kebebasan dan tidak akan menulis semula kontrak untuk pihak-pihak tersebut, yang dengan nyata dan berhati-hati memilih untuk tidak membenarkan campur tangan mahkamah. Dalam kes ini, pihak-pihak tersebut telah memilih untuk mematuhi Kaedah-Kaedah Timbang Tara UNCITRAL dan KLRCA dan pilihan mereka hendaklah dilihat berdasarkan sebagai akibat daripada s 34(1) Akta Timbang Tara 1952 ('Akta tersebut'). Dengan pengecualian untuk penguatkuasaan award timbang tara dengan kebenaran Mahkamah Tinggi, s 34 Akta tidak membenarkan penggunaan Akta atau undang-undang bertulis yang lain kepada apa-apa award yang tertakluk di bawah Kaedah-Kaedah Timbang Tara UNCITRAL dan KLRCA (lihat perenggan 15–16).

(3) Selain daripada 'the emergency situation' atau satu keadaan darurat seperti dalam kes *Thye Hin Enterprises Sdn Bhd v Daimlerchrysler Malaysia Sdn Bhd* [2005] 1 MLJ 293 (MR), preponderans autoriti menunjukkan bahawa di bawah s 34(1) Akta, peruntukan-peruntukan Akta atau undang-undang bertulis yang lain tidak akan digunakan terhadap apa-apa timbang tara yang dijalankan — seperti dalam kes ini — di bawah Kaedah-Kaedah Timbang Tara UNCITRAL dan Kaedah-Kaedah KLRCA. Dalam kes ini, pihak-pihak tersebut telah dengan jelas dan nyata, tidak memasukkan pertikaian tersebut dalam bidang kuasa Mahkamah Tinggi (lihat perenggan 36).

(4) Seksyen 27 Akta dengan nyata, memperuntukkan budi bicara Mahkamah Tinggi untuk memberi kebenaran untuk menguatkuasakan, secara umum, satu award timbang tara yang diberikan di bawah Akta, dan bukan di bawah Kaedah-Kaedah Timbang Tara UNCITRAL dan Kaedah-Kaedah KLRCA (lihat perenggan 42).

(5) Penguatkuasaan satu award timbang tara yang dibuat berdasarkan Kaedah-Kaedah Timbang Tara UNCITRAL dan Kaedah-Kaedah KLRCA — seperti dalam kes ini — dengan spesifiknya dikawal oleh s 34(1), (2) dan (3) Akta tersebut. Pelaksanaan award sebegitu adalah satu pengecualian terhadap prinsip pengecualian umum yang tidak memerlukan permohonan-permohonan peruntukan-peruntukan Akta tersebut atau undang-undang bertulis yang lain terhadap satu award timbang tara di bawah Kaedah-Kaedah Timbang Tara UNCITRAL dan Kaedah-Kaedah KLRCA. Seksyen 34(1) dibaca bersama s 34(2) Akta

membenarkan pelaksanaan di bawah s 34(2) di Malaysia, satu award timbang tara yang dibuat di bawah s 34(1). Menurut s 34(3), mahkamah yang mempunyai bidang kuasa kompeten untuk melaksanakan penguatkuasaan tersebut ialah Mahkamah Tinggi (lihat perenggan 43).]

Notes

For a case on rules and regulations, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1469.

For cases on construction of the arbitration clause, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1240–1241.

For cases on enforcement of award, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1316–1329.

For cases on implied terms, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5388–5433.

Cases referred to

Eternal Construction Sdn Bhd lwn Kerjaya Balfour Beatty Cementation Sdn Bhd dan satu lagi [2004] 7 MLJ 537; [2004] 2 CLJ 631, HC (refd)

Jati Erat Sdn Bhd v City Land Sdn Bhd [2002] 1 CLJ 346, HC (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (refd)

Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd & Anor [1990] 3 MLJ 183, HC (refd)

Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151; [1998] 3 CLJ 503, FC (distd)

Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors [1998] 2 MLJ 20; [1998] 3 CLJ 275, CA (refd)

Soilchem Sdn Bhd v Standard-Elektrik Lorenz AG [1993] 3 MLJ 68, HC (refd)

Thye Hin Enterprises Sdn Bhd v Daimlerchrysler Malaysia Sdn Bhd [2005] 1 MLJ 293; [2004] 3 CLJ 591, CA (not folld)

Visage Engineering Sdn Bhd v Smart Frame Sdn Bhd [2009] MLJU 665; [2009] 1 LNS 779, HC (refd)

Legislation referred to

Arbitration Act 1952 ss 24(2), 25(2), 27, 34, 34(1), (2), (3)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 s 2(1)

Rules of the High Court 1980 O 18 r 19(1)(a)

Appeal from: Originating Motion No R1–25–281 of 2007 and Originating Summons No R1–24–79 of 2007 (High Court, Kuala Lumpur)

Mubashir bin Mansor (Skrine) for the appellant.
Liza Chan Sow Keng (Liza Chan & Co) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEALS

[1] We find it useful to tabulate these two appeals, by Asia Control Systems IMPAC (M) Sdn Bhd ('the appellant'), against two decisions of the Kuala Lumpur High Court, as follows:

Appeal No	Order Appeal Against
(1) W-02–1990–2009	Dismissal of the appellant's originating motion which sought to set aside the arbitrator's award.
(2) W-02–1982–2009	Allowed the respondent's (PNE PCB BERHAD'S) originating summons and granted leave to enforce the arbitrator's award.

AGREED FACTS

[2] The parties have entered into a contract dated 14 May 1998 ('the contract'). Clause 8 thereof is the arbitration clause.

[3] The arbitrator handed down his award on 27 August 2007 ('the award') against the appellant.

[4] The award was made pursuant to the United Nations Commission on International Trade Law ('UNCITRAL') Arbitration Rules and the Rules of the Kuala Lumpur Regional Centre for Arbitration ('KLRCA') (revised August 2001).

[5] The appellant's application vide originating motion dated 5 October 2007, based on article 10(1) and (2) of the UNCITRAL Arbitration Rules and s 24(2) of the Arbitration Act 1952, to set aside the arbitrator's award, was dismissed by the High Court (a reference hereinafter to a section is a reference to that section in the Arbitration Act 1952, unless otherwise stated). The appellant's appeal against the decision of the High Court was registered as No W-02–1990–2009.

[6] On the other hand, the respondent's application by way of originating summons for leave to enforce the award was allowed by the High Court. The appellant's appeal against that decision was registered as W-02–1982–2009.

APPLICATION TO SET ASIDE THE AWARD: JURISDICTION

[7] Appellant's learned counsel, Mr Mubashir bin Mansor, argued that the

High Court erred in holding that s 34(1) took the arbitration out of the jurisdiction of the Court. He elaborated, inter alia, that:

(a) Section 34(1) left the issue of jurisdiction to the UNCITRAL Arbitration Rules and the Rules of the KLRCA, and there was an express or implied term in the contract on recourse to the High Court, relying on *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 at pp 168–170; [1998] 3 CLJ 503 (FC) at pp 531–533 and s 24(2);

(b) The right to challenge the arbitrator under article 10 of the UNCITRAL Arbitration Rules necessarily included the right to challenge the award (a reference to an article hereinafter is a reference to that article in the UNCITRAL Arbitration Rules, unless otherwise stated);

(c) The arbitrator may be challenged on grounds of justifiable doubts on his impartiality or independence under article 10(1), or for other reasons under article 10(2); and

(d) The High Court failed to appreciate that the aforesaid grounds were not raised in the earlier authorities which considered s 34(1) viz:

(i) *Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd & Anor* [1990] 3 MLJ 183 (HC);

(ii) *Soilchem Sdn Bhd v Standard-Elektrik Lorenz AG* [1993] 3 MLJ 68 (HC);

(iii) *Jati Erat Sdn Bhd v City Land Sdn Bhd* [2002] 1 CLJ 346 (HC);

(iv) *Eternal Construction Sdn Bhd lwn Kerjaya Balfour Beatty Cementation Sdn Bhd dan satu lagi* [2004] 7 MLJ 537; [2004] 2 CLJ 631 (HC);

(v) *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors* [1998] 2 MLJ 20; [1998] 3 CLJ 275 (CA);

(vi) *Thye Hin Enterprises Sdn Bhd v Daimlerchrysler Malaysia Sdn Bhd* [2005] 1 MLJ 293; [2004] 3 CLJ 591 (CA); and

(vii) *Visage Engineering Sdn Bhd v Smart Frame Sdn Bhd* [2009] MLJU 665; [2009] 1 LNS 779 (HC).

[8] In reply, respondent's learned counsel, Ms Liza Chan Sow Keng, contended that the parties have elected to exclude their dispute from the jurisdiction of the court. She cited ss 24(2) and 34(1), *Klockner Industries-Anlagen GmbH*, *Soilchem Sdn Bhd* and *Sarawak Shell Bhd* in support thereof.

[9] The High Court took the view, inter alia, that s 34(1) expresses the clear intention of Parliament not to give jurisdiction to the court as the 'parties have proceeded to arbitration knowing full well the limitation of the court set out in s 34(1).

[10] In dealing with the appellant's contention that there was an express term of the agreement to provide for recourse to the High Court, we are constrained to note that, upon our perusal of the contract, we are unable to find any express term to provide for this recourse. We therefore reject this contention.

[11] In relation to the appellant's argument that there was an implied term in the contract, to permit recourse to the High Court, we respectfully refer to *Sababumi (Sandakan) Sdn Bhd*, where the Federal Court, through the judgment of Peh Swee Chin FCJ (as he then was), propounded three types of implied terms viz:

(a) terms which the court infers from evidence that the parties to a contract must have intended to include in the contract though not expressly set out therein;

(b) terms that come about by operation of law; and

(c) terms that are implied by reasonable custom and usage of any market or trade.

[12] For the first type of implied term, his Lordship set out two tests to be fulfilled viz:

(a) subjective in nature, 'something so obvious that it goes without saying, so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provisions for it in the agreement, they would testily suppress him with a common 'Oh, of course'; and

(b) the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. Business efficacy means the desired result of the business in question.

[13] In the instant appeal, we are unable to imply any term into the contract entered into by the parties herein which is capable of being construed as giving rise to any recourse to the court.

[14] Quite apart from that, we also find that the Federal Court judgment in *Sababumi (Sandakan) Sdn Bhd*, is not helpful to the appellant at all as it did not revolve around the issue of an arbitration clause and the implied term

giving rise to a recourse to the High Court. The facts there concern betting and gaming licences and hence are readily distinguishable from those herein.

[15] Reverting to the instant appeal, it is our specific finding that the parties have freely and voluntarily entered into the contract. We are not at liberty and will not rewrite the contract for the parties who have expressly and carefully chosen to exclude court intervention. They have elected to abide by the UNCITRAL Arbitration Rules and the Rules of the KLRCA. That election by them must be viewed in the light of the consequences flowing from s 34(1).

[16] We are of the view that, except for the enforcement of an arbitral award with leave of the High Court, s 34 excludes the application of the Act or other written law to any arbitration held under the UNCITRAL Arbitration Rule and the Rules of the KLRCA. Section 34(1) reads:

> 34 Act not to apply to certain arbitrations
>
> (1) Notwithstanding anything to the contrary in this Act or in any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.
>
> (2) Where an award made in an arbitration held in conformity with the Convention or the Rules specified in subsection (1) is sought to be enforced in Malaysia, the enforcement proceedings in respect thereof shall be taken in accordance with the provisions of the Convention specified in subsection (1) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, as may be appropriate.
>
> (3) The competent court for the purpose of such enforcement shall be the High Court (Added by Act A478/80).

[17] The legal implications of s 34 had been extensively explored by our courts in a good number of judgments. We propose to embark on a detailed discussion in order to distill the principles therefrom.

Klockner Industries-Anlagen GmbH

[18] The applicant and first respondent are parties to a contract relating to the installation of a pulp and paper mill in Sipitang, Sabah, Malaysia. A dispute arose between them. According to cl 37 of the contract, the dispute has to be settled by arbitration in accordance with the Rules of the KLRCA.

Pursuant to the clause, parties submitted their dispute to the KLRCA for arbitration. The arbitrators were duly appointed and the parties filed their pleadings. During the adjournment of the arbitration proceedings pending in the KLRCA, the applicant filed an application in the High Court for an order, inter alia, that the applicant be at liberty to continue the counterclaim against the first respondent. The High Court has to consider whether it has the power to make an order as prayed in the application. Zakaria Yatim J (later FCJ) dismissed the application and held that:

(a) It is clear that under cl 37, the court cannot exercise its supervisory function as provided in the Arbitration Act 1952, in respect of such arbitration. Neither can the court exercise its supervisory function over such arbitration under any written law.

(b) By virtue of s 34, the arbitral tribunal has to decide the issues raised before it and the court cannot and will not interfere with the proceedings of the tribunal.

(c) The court has no jurisdiction to make the order sought by the applicant.

Soilchem Sdn Bhd

[19] An arbitration agreement between Soilchem Sdn Bhd ('the applicant') and Standard-Elektrik Lorenz AG ('the respondent') provided for disputes to be settled by arbitration under the Rules of the KLRCA. An award was made under the KLRCA on 10 February 1990 and two supplementary awards as to costs were made on 30 March 1990 and 11 January 1991. The applicant then commenced an originating motion to challenge the arbitrator's awards by way of certiorari. On 24 July 1991, the respondent applied for, inter alia, an order that the applicant's originating motion be struck out. Abu Mansor J (later FCJ) ordered that the applicant's originating motion be struck out, as the policy of s 34(1) was obviously to exclude cases that are before the KLRCA from intervention by the court. Section 34(1) was meant to and does exclude the jurisdiction of the court, such as the jurisdiction to quash by way of certiorari.

Jati Erat Sdn Bhd

[20] While arbitration proceedings between the plaintiff and defendant were afoot at the KLRCA, the plaintiff applied by way of originating summons in the High Court for a Mareva injunction to restrain the defendant from dissipating certain assets, until one month after the arbitration proceedings were resolved.

A **[21]** On the issue of jurisdiction, I held in the High Court that the arbitration proceedings came within the ambit of the clear and precise provisions of s 34(1) which excluded the application of the Act or other written law to the arbitration proceedings.

B **[22]** In any event, I also proceeded to consider the merits of the plaintiff's application for Mareva injunction. Having examined the essential elements which the plaintiff has to establish in order to obtain the Mareva injunction, I concluded that the plaintiff has failed to discharge the burden of proof for this purpose. Hence, the plaintiff's originating summons was dismissed with C costs.

[23] After delivering my grounds of judgment, I am unaware if the plaintiff had pursued the matter further in the Court of Appeal or the Federal Court.

D *Eternal Construction Sdn Bhd*

[24] The parties had entered into a construction contract which contains an arbitration clause, to refer their dispute to arbitration under the Rules of E the KLRCA. Their dispute had been referred to arbitration and the arbitration proceedings were still pending.

[25] The plaintiff vide originating summons in the High Court sought several reliefs including an injunction. F

[26] The first defendant applied by way of summons in chambers under O 18 r 19(1)(a) to set aside the plaintiff's originating summons.

G **[27]** In allowing the first defendant's application and striking out the plaintiff's originating summons, Sulaiman Daud J (now JCA) held, inter alia, that s 34 applied to exclude the jurisdiction of the High Court.

Sarawak Shell Bhd

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[28] This was an appeal against the decision of the High Court judge who held that s 34(1) prohibited any reference to s 25(2). The parties had entered into a contract whereby all disputes were to be conducted by arbitrators under the relevant Arbitration Rules ('the Rules') and not the court. On 15 I March 1996, the respondents had written to the appellant concerning the valuation of the contract in which they accused the appellant of conspiring with their subcontractors to take over works awarded to the joint venture. The appellant denied the allegations claiming such remarks were defamatory and insisted the remarks be withdrawn. The respondents persisted and, in

their letter of 14 May 1996, stated that if the appellant insisted on maintaining their stand, the respondents would pursue the point in arbitration. On 24 May 1996, the respondents served a written notice with points of claim on the appellant in accordance with the Rules and thereafter appointed an arbitrator. The Director of the Regional Centre for Arbitration ('the director') was informed and the initial payment was duly made. On 25 June 1996, the director informed the appellant that the appointment of their arbitrator was due. By that stage the arbitration had commenced. The appellant sought to stymie the arbitration proceedings commenced by the respondents by filing an originating summons on 26 June 1996 praying that the court exercise its powers under s 25(2) which empowers the High Court to revoke the authority of an arbitrator or to restrain arbitration proceedings where the arbitrator is not impartial or where fraud is involved. The originating summons was later amended to include a claim that the court also had jurisdiction at common law or an inherent jurisdiction to make the orders sought. In delivering the judgment of the court, and dismissing the appeal, Mahadev Shankar JCA (as he then was) held that the effect of s 34(1) was to exclude altogether not just s 25(2) but the entire Act and all other written laws from an arbitration held under the Rules.

Thye Hin Enterprises Sdn Bhd

[29] This was an appeal from the decision of the High Court in upholding the defendant's preliminary objection and dismissing the plaintiff's application for an interim injunction to maintain the status quo of the parties pending the resolution (by arbitration) of the contractual dispute between the plaintiff and the defendant.

[30] The High Court did not take the plaintiff's application through the principles enunciated in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293 (CA).

[31] The facts revealed that pursuant to a dealership agreement entered into earlier, the defendant (distributor) had appointed the plaintiff as a dealer for its Mercedes Benz vehicles in the States of Perlis and Kedah. The agreement had provided that any dispute between them shall be referred to arbitration at the KLRCA.

[32] The central issue that arose for decision before the Court of Appeal was whether the grant of the injunction was proscribed by s 34. Mohd Ghazali Yusoff JCA (now FCJ) delivering the judgment of the court (including Nik Hashim JCA (later FCJ) and me) held that s 34 'only excludes interference with the arbitration itself' and 'has no application to cases where interim relief is urgently required'. Consequently, 'the grant of interim relief

pending the outcome of an arbitration held at the KLRCA is not prohibited by s 34'. The decision of the High Court in upholding the defendant's preliminary objection was set aside and the plaintiff's application was remitted to the High Court to be heard on merits, which approach is indeed consistent with that adopted by me in the second part of my judgment in *Jati Erat*.

[33] The Court of Appeal in *Thye Hin Enterprises Sdn Bhd*, was entirely in agreement with the views of the learned author Sundra Rajoo in the article entitled '*Issues Related to Arbitrations Conducted under the KLRCA Arbitration Rules*' [2003] 3 MLJ xlix that while the decision in *Jati Erat*, is correct on the plain reading of s 34, it would seem that the KLRCA rules recognise the need for court intervention in certain situations, particularly in emergency cases. The court further stressed that 'the grant of interim relief pending the outcome of an arbitration held at the KLRCA is not prohibited by s 34'.

[34] Reverting to the instant appeal, it is abundantly clear to us that the ratio in *Thye Hin Enterprises Sdn Bhd,* relates to the grant of interim relief in emergency cases or in a state of urgency, but does not extend to cover the instant appeal, which sought to set aside an award which had already been handed down. The question of an emergency case or a state of urgency is completely non-existent in the instant appeal. In the circumstances, we hereby hold that the judgment in *Thye Hin Enterprises Sdn Bhd*, is not supportive of the appellant's submission.

Visage Engineering Sdn Bhd

[35] The respondent was the claimant in the arbitration proceedings relating to a construction claim. The arbitrator was appointed by consent of the parties by the Director of the KLRCA. The arbitrator after hearing the parties had published the final award. The applicant filed an originating motion seeking, inter alia, to set aside the award. Hamid Sultan JC (now J) held that s 34 applies and the court cannot intervene.

[36] Our analysis of the relevant judgments above makes it crystal clear to us that apart from 'the emergency situation' or a state of urgency in *Thye Hin Enterprises Sdn Bhd*, the preponderance of authorities reveals a consistent pattern under s 34(1) ie the Act or other written law shall not apply to any arbitration held under, as in the instant appeal, the UNCITRAL Arbitration Rules and the Rules of the KLRCA. This exclusionary principle is predominant and prevails, particularly where s 34(1) begins with the words 'Notwithstanding anything contrary in this Act or any other written law.' The parties herein have consciously and decisively agreed and chosen the special alternative dispute resolution ie arbitration under the UNCITRAL

Arbitration Rules and the Rules of the KLRCA. This freedom of choice exercised by the parties is clear and unambiguous. The intention of the parties is to expressly exclude the dispute from the jurisdiction of the High Court. This intention is further manifested in cl 8, in the following words:

> All claims and disputes between 'IMPAC' and PNE PCB Bhd, including matters arising out of or relating to this Agreement, shall be resolved by formal arbitration. The rules and procedures of the Regional Centre for Arbitration Kuala Lumpur shall apply unless the parties mutually agree otherwise.

[37] The parties herein have not mutually agreed otherwise.

ENFORCEMENT OF AWARD

[38] Finally, in resisting the leave granted by the High Court to enforce the arbitrator's award, the appellant argued that there was a contradiction in terms in the High Court's grounds of decision in having accepted the appellant's contention that the award was not a 'convention award' within the meaning of s 2(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('the 1985 Act'), and yet had granted leave to enforce the award pursuant to the respondent's originating summons.

[39] In reply, the respondent relied on s 27 and s 34(2) in support of the contention that the High Court had correctly granted leave to enforce the award.

[40] The High Court had sustained the respondent's contention.

[41] The question which we must address is:

> Upon the true construction of s 27 and s 34, was the High Court correct in granting leave to the respondent herein to enforce the award?

[42] Section 27 expressly provides for the discretion of the High Court to grant leave for the enforcement generally of an arbitral award handed down under the Arbitration Act 1952, and not pursuant to the UNCITRAL Arbitration Rules and the Rules of the KLRCA. It reads:

> Enforcement of award
>
> 27. An award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, and, where leave is so given, judgment may be entered in terms of the award.

A **[43]** In the instant appeal, the enforcement of an arbitral award made pursuant to the UNCITRAL Arbitration Rules and the Rules of the KLRCA is more specifically governed by the combined effect of s 34(1), (2) and (3), reproduced in extenso above. The enforcement of such an award is indeed an exception to the general exclusionary principle which dispenses with the B application of the provisions of the Act or other written law to an arbitration held under the UNCITRAL Arbitration Rules and the Rules of the KLRCA. Section 34(1) read with s 34(2) permits the enforcement under s 34(2) in Malaysia of an arbitral award made under s 34(1). Pursuant to s 34(3), the court of competent jurisdiction to effect the enforcement is the High Court.

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[44] In the circumstances, we have no difficulty in answering the above question in the affirmative.

CONCLUSION

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[45] On the grounds given above, we dismissed both these appeals with costs of RM5,000, in each appeal, to the respondent. The deposit is to be paid to the respondent on account of the fixed costs.

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Appeals dismissed with costs.

Reported by Andrew Christopher Simon

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